Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

AMIR JAMES ATTAR,
PERFECT VIEW, INC.

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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40 pp

QUESTIONS PRESENTED

I. Whether a defendant may be forced to represent himself at sentencing when defense counsel is allowed to withdraw during sentencing due to an ethical conflict caused by a defendant's insistence upon his innocence.

II. Whether a Court of Appeals may affirm a District Court's decision to force defendants to represent themselves at sentencing based upon a factual determination that defendants intentionally created a conflict, a finding that had not been made by the District Court and was not supported by the evidence.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix. (Appendix A, pp. 1a-15a).

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AMIR JAMES ATTAR,
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Petitioners

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UNITED STATES OF AMERICA,

Respondent

_____

JURISDICTIONAL STATEMENT

_____

On October 27, 1994, the United States Court of Appeals for the Fourth Circuit entered judgment affirming Petitioner's sentencing. On November 23, 1994, the Fourth

Circuit denied Petitioner's petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be ...deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides.

> In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Introduction

On the day the Petitioners, Dr. A. J. Attar, a noted research chemist, and Perfect View, Inc., were sentenced, the district court granted their counsel's motion to withdraw due to an unspecified conflict of interest that apparently arose from Dr. Attar's insistence upon maintaining his innocence during

sentencing, although the court had denied counsel's similar motion the week before sentencing. The district court, having allowed counsel to withdraw, then required Petitioners to appear pro se at sentencing, refusing to allow Petitioners any time to find substitute counsel despite Dr. Attar's lack of preparation or ability to represent himself. The court sentenced Dr. Attar to the highest sentence under the highest possible guideline range. The United States Court of Appeals affirmed this procedure, finding that Petitioners were somehow to blame for the withdrawal of their counsel and that they could therefore be forced to proceed pro se. No such finding had been made by the district court.

B. Proceedings Prior to Sentencing

As the Court of Appeals predicated its decision upon its view of the proceedings leading up to sentencing, it is necessary to review these proceedings.

Dr. Amir James Attar is a noted research chemist and former university professor, who founded and ran Perfect

View, Inc. Perfect View entered into contracts with the United States Government under which Perfect View would do research concerning detection of toxic gases with dosimeters. The government suspected that Perfect View had submitted various false statements and claims during the performance of the contracts. An investigation resulted in an indictment charging Petitioners with 196 counts of submitting false claims, some as small as $30.00, to the government. The essence of the government's case was the belief that Dr. Attar had improperly altered time sheets to shift time spent on one contract to anther, or to shift commercial work to the research contracts. Dr. Attar denied any wrongdoing, explaining that the time sheets were altered to correctly apportion the work that was done and that the contracts had been fully performed for the agreed upon price.

On the eve of trial, fearing that the trial would greatly embarrass his family, Dr. Attar and Perfect View entered into a plea agreement under which they plead guilty to two counts

of the indictment and waived appellate review of the sentence.

Sentencing was set for July 12, 1993. On March 9, 1993, Dr. Attar was interviewed by the Probation Officer about the offense conduct. During this interview Dr. Attar maintained his innocence, asserting that he had acted in good faith. The Presentence Report was not completed until June 24, only eighteen days before sentencing. Due to the complexity of the issues involved in the sentencing, and counsel's vacation schedule, sentencing was continued without objection of the government until August 23, 1993. Both defense counsel and the government filed numerous objections to the Presentence Report.

On August 18, 1993, Petitioners' counsel filed a motion to withdraw as counsel, stating counsel and Dr. Attar had "a substantial and irreconcilable conflict" and that continued representation would "be in violation of the North Carolina Code of Professional Conduct" and "would also deprive the Defendant of his Sixth Amendment right to the effective

assistance of counsel." Although not specified, it appeared that the only source of a conflict was Dr. Attar's insistence upon claiming that he was innocent. The motion also indicated that Dr. Attar wished to retain counsel to file a motion to withdraw his plea. On the same day, without conducting a hearing, the district court denied counsel's motion to withdraw and refused to continue the sentencing.

C. **Sentencing**

On August 23, the day of sentencing, Dr. Attar briefly addressed the court and stated that he was not guilty, had entered his plea to protect his family, and wished to have another counsel pursue a motion to withdraw his plea. The court stated that it would not permit Dr. Attar to withdraw his plea, and asked Dr. Attar if he wished to proceed with present counsel or pro se. Dr. Attar asked for a moment to consider the court's question, which was granted.

At this point counsel addressed the court, explaining again, in general terms that a conflict existed and that it

prevented him from representing Petitioners. After listening to counsel, and without further discussion with Dr. Attar, the court permitted counsel to withdraw and required Petitioners to appear pro se. Dr. Attar made clear that he was not prepared or able to represent himself. After hearing witnesses testify concerning the government's contentions, none of whom Dr. Attar was prepared to cross-examine, the court accepted all of the government's arguments concerning upward adjustments to the guideline calculation, and then sentenced Dr. Attar to 41 months in prison, the top of the guidelines.

D. Opinion of the Fourth Circuit

The United States Court of Appeals for the Fourth Circuit held that Petitioners could properly be required to represent themselves at sentencing, despite finding that Petitioners had not exercised a constitutionally valid waiver of counsel. The Fourth Circuit found that the district court permitted counsel to withdraw based upon *counsel's* motion and based upon finding a conflict that prevented further

representation, and rejected the government's claim that the court had simply allowed Dr. Attar to chose to proceed pro se. The Fourth Circuit nevertheless concluded that Petitioners were not entitled to any time to find new counsel. The Fourth Circuit reached this conclusion by finding "that a district court might properly find that the belated creation by a defendant of an inextricable ethical predicament for his counsel constitutes a plausible basis for exercising discretion to deny a continuance to secure new counsel after allowing former counsel to withdraw". Slip. Op at 14.

The district court, of course, had made no finding that Dr. Attar intentionally manufactured a conflict with counsel for the purpose of delaying sentencing, nor was there any factual basis upon which the Fourth Circuit made this finding.

I. IN HOLDING THAT A CRIMINAL DEFENDANT MAY BE DENIED COUNSEL WHEN COUNSEL IS PERMITTED TO WITHDRAW DUE TO AN ETHICAL CONFLICT, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED

THIS CASE IN A MANNER THAT CONFLICTED WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In this case the Fourth Circuit held that a trial court can relieve counsel on the day of sentencing, based upon a conflict of interest, without any advance notice to defendant and at the same time deny a defendant's explicit request for time to find substitute counsel. The Fourth Circuit approved the district court's actions in forcing Petitioners to appear pro se although the district court previously denied counsel's motion to withdraw, thereby giving Petitioners no notice that they would be forced to appear pro se, and although the district court never gave any advance warning to Petitioner that his insistence upon his innocence, which was the source of the conflict, would result in a waiver of his Sixth Amendment right to counsel.

The Fourth Circuit's decision is unprecedented, and conflicts with established principles set forth by this Court and

other circuits. This Court has made clear that denial of a motion for continuance necessary to obtain counsel may violate a defendant's Fifth Amendment right to due process as well as his Sixth Amendment right to counsel. *Ungar v. Sarafite*, 376 U.S. 575, 588-589 (1964). Although a court is given discretion in ruling on motions to continue, even when based upon a need to find substitute counsel, *Morris v. Slappy*, 461 U.S. 1 (1983), "a myopic insistence upon expeditiousness in the fact of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar*, 376 U.S. at 589.

Numerous decisions from other Circuits have held that when a request to change counsel is made, the trial court must determine if there is good cause for withdrawal of counsel; if there is good cause, then the court must allow the defendant enough time to find new counsel, and if good cause is not shown, the court should inform the defendant that he can

either proceed with present counsel or proceed pro se. See, e.g., *McMahon v. Fulcomer*, 821 F.2d 934, 944 (3rd Cir. 1987); *United States v. Silkwood*, 893 F.2d 245, 248 (9th Cir. 1989) *cert. denied*, 496 U.S. 908 (1990); *United States v. Welty*, 674 F.2d 185, 187 (3rd Cir. 1982). A trial court may not relieve counsel, and then require a defendant to appear pro se, even when counsel's difficulty in representing the defendant stems from a defendant's unwillingness to cooperate with counsel. *Hendricks v. Zenon*, 993 F.2d 664 (9th Cir. 1993)(a defendant's desire to substitute counsel is not a basis for holding that he has elected to proceed pro se). *Jackson v. James*, 839 F.2d 1513 (11th Cir. 1988); *United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989).

There is a small group of extreme cases in which a defendant's repeated refusal to accept counsel and repeated requests for new counsel can lead to a finding that the

defendant will accept no lawyer, and an implicit waiver of counsel. See e.g., *United States v. Harris*, 2 F.3d 1452 (7th Cir.) *cert. denied*, 126 L.Ed 2d 432 (1993); *United States v. Kelm*, 827 F.2d 1319 (9th Cir. 1987); *United States v. Moore*, 706 F.2d 538 (5th Cir.), *cert. denied*, 464 U.S. 859 (1983).

This case did not involve repeated refusals to accept counsel, nor did it involve repeated bad faith delays. Petitioners were represented by one counsel, Petitioners had obtained only one prior continuance, which was obtained for the sake of counsel, who needed time to prepare for sentencing and who had a vacation scheduled. In addition, Dr. Attar did not suddenly begin to claim his innocence shortly before sentencing, but rather had maintained his innocence when first interviewed by the probation officer. Dr. Attar did nothing to indicate that he would accept no lawyer, but rather made clear that he simply wished to have a lawyer who would handle the case in a manner consistent with Dr. Attar's innocence. In no

respect can this be deemed the type of extreme case in which a court would be justified in finding that a defendant was manipulating his right to counsel to delay proceedings.

The Fourth Circuit's holding is inconsistent with decisions of this Court and other circuits, and is worthy of review.

II. IN HOLDING THAT THE DISTRICT COURT WAS ENTITLED TO DEPRIVE PETITIONERS OF COUNSEL, BASED UPON THE EXISTENCE OF A CONFLICT STEMMING FROM PETITIONER'S CLAIM OF INNOCENCE, THE FOURTH CIRCUIT DECIDED AN IMPORTANT FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This Court has made clear that a defendant's choice between counsel and pro se representation must be knowing, intelligent and voluntary. *Farette v. California*, 422 U.S. 806, 835 (1975); *Johnson v. Zerbst*, 304 U.S. 458 (1938). While the standards for explicit waiver are clear, this Court has never set the standards to be followed when a trial court deprives a

defendant of counsel upon a finding of implicit waiver of counsel based upon bad faith manipulation of the right to counsel by a defendant. This issue is important as without proper guidance to the lower courts, persons such as Dr. Attar may be sentenced to prison without the assistance of counsel based upon a faulty finding of implicit waiver of counsel.

Although lower courts have repeatedly dealt with cases in which a defendant appears to be manipulating his right to counsel to obtain delays, and have struggled to determine when a defendant's actions are sufficient to justify a waiver of counsel, compare *United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987)(finding defendant's actions did not amount of waiver) and *United States v. Kelm*, 827 F.2d 1319 (9th Cir. 1987)(finding defendant engaged in bad faith delays). There is also no set standard for dealing with even admittedly obstinate defendants. In this case, the Fourth Circuit allowed the district court to deny Petitioners any counsel, based upon

the belief that a conflict had been manufactured, rather than holding that a manufactured conflict is not a real conflict that entitles counsel to withdraw. In contrast in *United States v. Burns*, 990 F.2d 1426 (9th Cir.) *cert. denied*, 124 L.Ed. 2d 696 (1993) and *United States v. Birrell*, 286 F.Supp. 885 (S.D.N.Y. 1968), defendants were found to have manufactured conflicts by filing frivolous grievances or lawsuits against counsel. In neither one of these cases was a defendant forced to proceed without counsel, as both cases held that a manufactured conflict was not a real conflict and refused to allow counsel to withdraw.

As anyone with experience in criminal litigation knows, conflicts arise between defendants and their lawyers with regularity. The simple existence of such a conflict should not justify a district court's decision to force a defendant to proceed pro se. Rather, this Court should determine what steps must be taken to determine the nature and cause of the

conflict, and should make clear the limited conditions under which a trial court can deprive a citizen of their right to counsel based upon the existence of a conflict with counsel. The Fourth Circuit applied no known standards in depriving Petitioners of their right to counsel, and this court should grant the petition for a writ of certiorari to develop standards for implicit waiver of counsel.

III. IN MAKING A FACTUAL DETERMINATION THAT PETITIONERS HAD INTENTIONALLY CREATED A CONFLICT WITH COUNSEL, WHICH FACT FINDING WAS THE SOLE JUSTIFICATION FOR DEPRIVING PETITIONERS OF THEIR RIGHT TO COUNSEL, THE FOURTH CIRCUIT SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The Fourth Circuit concluded that the district court could force Petitioners to proceed pro se based upon the conclusion that the conflict that lead to counsel's withdrawal

had been intentionally and belatedly created by Petitioners to delay the proceedings. Had this finding been made by the district court after an appropriate hearing, the Fourth Circuit's reliance upon this "fact" would be unremarkable, even if its legal conclusion that this "fact" justified forcing Petitioners to proceed pro se was worthy of review. However, the district court never found any such "fact," nor does the record support such a finding. Rather, the Fourth Circuit found this "fact" on its own. This inappropriate fact-finding goes beyond the role an appellate court should play.

In analogous situations, this Court has held that an appellate court should not be permitted to affirm a district court's actions by reassessing the facts of a case to create a theory not relied upon by the district court. *See McCormick v. United States*, 500 U.S. 257 (1991)("Appellate courts are not permitted to affirm convictions on any theory they please because the facts necessary to support the theory were presented to the jury."); *Cole v. Arkansas*, 333 U.S. 196, 202

(1946)("To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and the issues that were determined in the trial court.").

The district court conducted no inquiry into whether Petitioners intentionally created a conflict in order to delay their sentencing, made no factual findings on this issue, and gave no indication that its actions were premised upon this basis. The Fourth Circuit's decision to find this "fact" is a particularly egregious departure from the accepted course of judicial process as it is a finding lacking any support in the record. The case had been continued only once before, based upon a legitimate request by counsel, and the conflict arose from Dr. Attar's insistence upon his good faith in dealing with the government. This claim of innocence did not arise for the first time shortly before sentencing, but rather had been made by Dr. Attar as soon as he was interviewed by the probation officer. A defendant's insistence upon his innocence cannot

be condemned as a bad faith tactic worthy of sanctions through the loss of counsel. The Fourth Circuit's actions in creative fact finding to justify the district court's denial of counsel to Petitioners is worthy of review by this Court.

CONCLUSION

Petitioners were forced to represent themselves during a complex sentencing because they insisted upon their innocence. This deprivation of counsel violated Petitioners' Fifth and Sixth Amendment rights and is worthy of review.

RESPECTFULLY submitted this the 17 day of February, 1995.

RUDOLF & MAHER, P.A.

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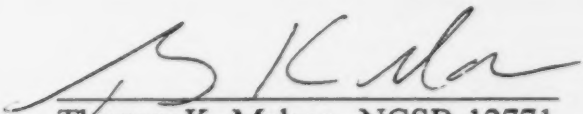
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing **Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit** was duly served upon the following by depositing same enclosed in a post paid, properly addressed envelope in a Post Office or official depository under the exclusive care and custody of the United States Postal Service.

This the 17th day of February, 1995.

RUDOLF & MAHER, P.A.



Thomas K. Maher; NCSB 12771
Attorney for Defendant

Served on:

Solicitor General
Department of Justice
Washington, DC 20530

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AMIR JAMES ATTAR,
Defendant-Appellant.

No. 93-5724

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PERFECT VIEW, INC.,
Defendant-Appellant.

No. 93-5725

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
James C. Fox, Chief District Judge.
(CR-92-88-F)

Argued: March 10, 1994

Decided: October 27, 1994

Before HAMILTON, Circuit Judge, and PHILLIPS
and CHAPMAN, Senior Circuit Judges.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Hamilton and Senior Judge Chapman joined.

COUNSEL

ARGUED: Thomas Kieran Maher, Chapel Hill, North Carolina, for Appellants. Robert Daniel Potter, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** J. Douglas McCullough, United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION

PHILLIPS, Senior Circuit Judge:

Amir Attar and Perfect View, Inc. (PVI) appeal the sentences imposed upon them following their entry of guilty pleas to charges of mail fraud. The appeal raises difficult issues concerning the scope of a waiver of appeal rights in a plea agreement and the extent of a district court's obligation to grant a continuance after granting defense counsel's motion to withdraw. Finding that the claims at issue here are not within the scope of the appeal-waiver provision, but that defendants' Sixth Amendment rights were not violated, we affirm the sentences imposed.

I.

Attar is a chemical engineer who was the president and majority owner of PVI, a research-and-development company which held various research contracts with the United States Government between 1987 and 1991. In 1991, Attar and PVI were indicted in the Eastern District of North Carolina on multiple counts of defrauding the federal government in connection with those research contracts, including 22 counts of mail fraud, 23 counts of submitting false claims to the United States, and 150 counts of making false statements to the United States. Attar retained two attorneys, Cheshire and Gusler, to represent him and PVI in connection with these charges.

At their arraignment, Attar and PVI entered pleas of not guilty, PVI through Attar as its corporate representative. The following day, as the jury was about to be selected, Attar and PVI changed their pleas

to guilty, pursuant to a plea agreement which their attorneys had negotiated with the government. The plea agreement provided that Attar and PVI would plead guilty to two counts of mail fraud, pay $120,000 in restitution, and forfeit certain property, in exchange for the government's agreement to dismiss the remaining 194 counts against them, to make no recommendation as to their sentence, and to stipulate that its loss was limited to $120,000. The plea agreement also contained a waiver-of-appeal-rights provision, in which Attar and PVI agreed to:

> waive knowingly and expressly all rights, conferred by 18 USC § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the Guideline range, reserving only the right to appeal from an upward departure from the Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 USC § 2255, excepting the . . . right to appeal based upon grounds of ineffective assistance of counsel and prosecutorial misconduct not known to the Defendants at the time of the[ir] . . . guilty plea.

JA 44.

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, before accepting the guilty pleas, the district court engaged in a lengthy colloquy with Attar, as representative of both himself and the corporate defendant. At the conclusion of that Rule 11 exchange, the district court found that the pleas were being freely and voluntarily entered and that they were supported by an independent basis in fact. It therefore accepted the pleas, adjudged the defendants guilty, and set their sentencing for about four months later.

About two and a half weeks before the scheduled sentencing hearing, the Probation Office issued its preliminary draft of the presentence report for Attar. Defense counsel moved to continue the sentencing, claiming that they needed more time to prepare their objections to the presentence report. The district court granted the motion, which was not opposed by the government, and rescheduled

the sentencing for a date approximately two months after the issuance of the preliminary draft of the presentence report. A week before this rescheduled sentencing hearing, the Probation Office issued the final presentence report, which increased Attar's guideline range by 13 months over that recommended in the initial draft.

Two days later, and only five days before the scheduled sentencing hearing, Cheshire and Gusler filed a motion to withdraw as defense counsel, together with a motion to continue sentencing a second time. (JA 78) The motion stated that Cheshire and Gusler had had "numerous and significant disagreements [with Attar] over the conduct of the case" since the entry of the guilty pleas five months earlier; that this disagreement concerned materials that Cheshire and Gusler wanted to file in response to the presentence report, but that the attorney-client privilege prevented them from explaining it further; and that their disagreement was now so "substantial and irreconcilable" that they believed their continued representation of the defendants would violate applicable ethical rules and deprive the defendants of their Sixth Amendment right to effective assistance of counsel. The motion also stated that Attar had informed Cheshire and Gusler that day that the defendants wanted to withdraw their guilty pleas, that they wished to retain other counsel to help them do so because they had "lost faith in" Cheshire and Gusler, and that they needed additional time to find substitute counsel. The motion asked the district court to continue sentencing long enough to permit the defendants to retain other counsel and to pursue their motion to withdraw their guilty pleas. The district court denied both the motion to withdraw and the accompanying motion for a continuance, without a hearing, and ordered the defendants to appear for sentencing as scheduled.

At the outset of the sentencing hearing, defense counsel renewed their motion to withdraw from the case, and the district court asked Attar whether he wanted them to continue to represent him. Attar responded that he was not guilty, that he had pled guilty only to protect members of his family, and that he wanted some time to retain new counsel to assist him in presenting a motion to withdraw his plea. (JA 86-87) The district court told Attar that it would not permit him to withdraw his plea, explaining that:

> You have pled guilty; we had an extensive Rule 11 colloquy and you elected to plead guilty; you have done so; the plea

> has been tendered and accepted by the Court. You are here for sentencing; the matter has been continued quite some time, and the Government is prepared to go forward with their burden. I am not going to allow you to withdraw your plea. You are going to be sentenced today.

JA 87. The court told Attar that he needed to choose between going forward with current counsel and going forward representing himself, either completely *pro se* or with current counsel as standby counsel. (JA 87). Attar did not give a direct response, saying only that he "was not really prepared right now to present argument as to why I've done what I've done and why I feel that justice is not done . . . by this plea or by this sentence." JA 88. The district court repeated that it was not going to allow Attar to withdraw his plea, because it "was intelligently made and that is behind us," and asked him once again to decide whether to go forward with current counsel or representing himself, with or without current counsel as standby counsel. JA 88. At this point, Attar asked to confer with Cheshire, which the court allowed him to do. Cheshire then addressed the court and attempted to explain the general nature of the conflict that he and Gusler believed had developed between them and the defendants. He stated that while he and Gusler were preparing a memorandum outlining their objections to the presentence report, Attar had informed them that the positions they were taking in that memorandum "were incorrect because he was not guilty," that he wanted to file a motion for a new trial because he was not guilty, and that he wanted to remove them as counsel for various reasons, which Cheshire said he could not explain "for fear of prejudicing somebody." (JA 89) After hearing Cheshire's remarks, and without any further discussion with Attar—e.g., a warning of the perils of proceeding *pro se*, or questioning designed to make sure that Attar did in fact desire to proceed *pro se*, rather than with current counsel, if he could not have a continuance to obtain substitute counsel—the district court stated tersely that the two attorneys "are allowed to withdraw as regular counsel" but ordered them to serve as standby counsel at sentencing. (JA 90) The court then proceeded directly to the sentencing hearing.

At the outset of that hearing, the district court permitted Cheshire and Gusler to file, under seal, the sentencing memorandum which they had prepared for Attar prior to their withdrawal. This caused

some confusion, because Cheshire had just told the court that Attar did not agree with the positions taken in that memorandum. In an effort to clarify Attar's position, the court asked him whether he was objecting to everything in the presentence report. Attar's confusing reply seemed to indicate that he objected to the *factual* basis of the presentence report, but that he wanted to withdraw all objections to the presentence report which Cheshire and Gusler had previously made on his behalf that were inconsistent with his current position that he was not guilty, and that he was "ready to be sentenced." (JA 91) Understandably unsure that Attar knew what he was doing, the district court decided to require the government to go forward with its evidence, as if Attar had objected to everything in the presentence report. (JA 92) The government then presented a summary of the evidence supporting the offense conduct and guideline applications contained in the presentence report. Attar declined to cross-examine any of the government's witnesses or to present any evidence for the defense, saying that he did not have the documents he needed to do so. (JA 193-203) Attar also failed to address any of the legal questions concerning the application of the various provisions of the guidelines which had previously been raised by Cheshire and Gusler.

At the conclusion of the sentencing hearing, the district court adopted the factual findings and proposed guideline applications contained in the presentence report and sentenced the defendants accordingly. The sentence that Attar received was at the top of the applicable guideline range after the district court applied several upward adjustments—all of which had been objected to by Attar's former counsel in their response to the presentence report.

Attar and PVI retained new counsel and took this appeal. On appeal, they contend principally that their sentences should be set aside because the proceedings following the entry of their guilty pleas —including both the sentencing hearing itself and the presentation of the motion to withdraw the guilty pleas that occurred at its outset— were conducted in violation of their Sixth Amendment right to counsel.

II.

At the outset, the government argues that this appeal must be dismissed because the defendants waived all relevant appeal rights in the plea agreement.[1] We disagree.

In this circuit, a waiver-of-appeal-rights provision in a valid plea agreement is enforceable against the defendant so long as it is "the result of a knowing and intelligent decision to forgo the right to appeal." *United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991); *see United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51, 52-54 (4th Cir. 1990); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc). Whether such a waiver is "knowing and intelligent" depends "upon the particular facts and circumstances surrounding [its making], including the background, experience, and conduct of the accused." *Davis*, 954 F.2d at 186. After examining the circumstances surrounding the adoption of this particular waiver provision, we agree with the government that it was knowingly and intelligently made.

The defendants were represented by counsel at the time they entered into the plea agreement that contained the waiver. Before accepting their guilty pleas, the district court conducted an extensive Rule 11 colloquy with Attar, as representative of both himself and the corporate defendant. During that colloquy, the court established that Attar was a well-educated man with a Ph.D in chemistry; that he was fully competent to plead for himself and the corporate defendant; that he understood the charges against himself and the corporate defendant and the range of penalties those charges carried; that he had discussed the applicability of the sentencing guidelines and their potential effect upon his sentence with his lawyers; that he had discussed the plea agreement extensively with his lawyers and was fully satisfied with

[1]Though we have already considered and rejected the government's waiver argument in denying a pre-argument motion to dismiss, we believe the issue remains open for reconsideration here, since it is essentially jurisdictional in nature. Upon reconsideration, however, we continue to adhere to our initial ruling that the waiver-of-appeal provision in the plea agreement does not bar this appeal.

their services in that regard; that he was aware that the exact length of his sentence was as yet undetermined, that the court was free to impose a sentence up to the statutory maximum, and that he would not be able to withdraw his guilty plea simply because the sentence imposed was more severe than he expected; and that he and PVI were in fact guilty of the misconduct charged in the two counts to which they were pleading guilty. (JA 52-56, 61-62). The district court then summarized the terms of the written plea agreement for Attar, including the provision waiving appeal rights, and verified that those terms accurately reflected the "sum and substance" of his agreement with the government. Though the district court did not explicitly ask Attar if he understood the significance of the waiver provision, it specifically drew that provision to his attention, and there is no indication in the record that he did not understand its import. Under these circumstances, we cannot say that Attar's decision to accept the waiver provision for himself and the corporate defendant was not a knowing and intelligent act. *See Davis*, 954 F.2d at 186 (finding waiver of appeal rights contained in plea agreement to be knowing and intelligent, even though trial judge did not explicitly question defendant about his understanding of the waiver provision, where the record established that the defendant was a college graduate, that he had no difficulty with the English language, and that he had discussed the plea agreement extensively with his counsel); *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (waiver of appeal rights may be knowing and intelligent, even if trial judge fails to specifically discuss the provision with the defendant during the Rule 11 colloquy, if "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver"). *Compare Wessells*, 936 F.2d at 168 (finding waiver of appeal rights in plea agreement *not* knowing and intelligent, when transcript of Rule 11 hearing revealed that trial judge had not explicitly questioned defendant about his understanding of the waiver provision, and the record indicated that the defendant did not otherwise understand its significance). We therefore conclude that the waiver of appeal rights contained in the plea agreement is generally valid and enforceable.

That does not end our inquiry, however, for the real dispute here is not about the general validity of the waiver-of-appeal-rights provision, but about its scope: that is, whether it prevents us from considering the particular claims defendants are asserting on this appeal. As

we have recognized previously, a defendant who executes a general waiver of the right to appeal his sentence in a plea agreement "does not [thereby] subject himself to being sentenced entirely at the whim of the district court," *Marin*, 961 F.2d at 496, but retains the right to obtain appellate review of his sentence on certain limited grounds. *Id.* In *Marin*, for example, we said that while a defendant who signs a general waiver of the right to appeal his sentence waives the right to appellate review of his sentence on the ground that it "rest[s] on an improper application of the guidelines or a violation of a procedural rule," he "could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race." *Id.* Nor do we think such a defendant can fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations. *See id*; *see also Bushert*, 997 F.2d at 350 n. 18 (general waiver of the right to appeal sentence in plea agreement does not bar appellate review of a claim that the sentence was imposed in violation of certain "fundamental and immutable" constitutional guarantees) (*dicta*).

In this case, defendants do not seek to challenge their sentences on the ground that they rest on an improper application of the guidelines or a violation of some procedural rule, as did the defendant in *Marin*. Instead, they seek to challenge their sentences on the ground that the proceedings following entry of the guilty plea—including both the sentencing hearing itself and the presentation of the motion to withdraw their pleas—were conducted in violation of their Sixth Amendment right to counsel. We do not think the general waiver of appeal rights contained in this plea agreement can fairly be construed as a waiver of the right to challenge their sentences on that ground. *See Marin*, 961 F.2d at 496; *Bushert*, 997 F.2d at 350 n.18.[2] Accordingly, we decline to dismiss this appeal, and proceed instead to its merits.

[2]Defendants also argue, citing *United States v. Craig*, 985 F.2d 175 (4th Cir. 1993), that a waiver of appeal rights in a plea agreement will

III.

Defendants' primary claim on appeal is that the district court improperly denied them the effective assistance of counsel guaranteed by the Sixth Amendment when it permitted their lawyers to withdraw at the beginning of the sentencing hearing, denied their request for a continuance to retain substitute counsel, and forced them to represent themselves during the rest of the proceedings in the district court, including both the sentencing hearing itself and the presentation of the motion to withdraw their pleas that occurred at its outset.[3] The gov-

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never preclude appellate review of the denial of a motion to withdraw the underlying guilty plea. We do not think *Craig* sweeps so broadly. Instead, we think *Craig* stands only for the proposition that a waiver of appeal rights in a plea agreement will not bar appellate review of the denial of a motion to withdraw the underlying guilty plea when the plea-withdrawal motion incorporates a *colorable* claim that the plea agreement itself—and hence the waiver of appeal rights that it contains—is tainted by constitutional error, be it lack of constitutionally effective assistance of counsel (as in *Craig* itself), unconstitutional denial of any counsel whatsoever, or something else. *See id.* at 178 (waiver of appeal rights in plea agreement will not bar appeal from denial of plea-withdrawal motion where "the waiver of appeal itself [is] being challenged by the motion to withdraw the guilty plea").

In this case, the plea-withdrawal motion whose denial defendants seek to challenge does incorporate a claim that the plea agreement and the waiver provision within it are tainted by constitutional error. Specifically, the defendants claim that the plea agreement was not voluntary, because the defendants entered into it only to spare Attar's family the embarrassment of trial. We do not think that claim of constitutional error is sufficiently "colorable" to implicate *Craig*. A defendant's desire to spare his family the embarrassment of trial is not sufficient to render his decision to plead guilty "involuntary" in the constitutional sense; if it were, virtually every guilty plea would be invalid, for a defendant can almost always claim that he entered into it in part to spare himself or his family the embarrassment of trial. We therefore conclude that the *Craig* principle has no application here.

[3]Defendants also claim that the district court violated their Fifth Amendment due process rights by refusing to grant them a continuance either to retain substitute counsel or to prepare to represent themselves,

ernment responds that the district court properly granted defendants' request to proceed *pro se*, and that Attar's waiver of the right to counsel was, as is required by *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), voluntary, knowing, and intelligent.

Underlying this appeal, therefore, lies a question of fact: When the district court "allowed counsel to withdraw" was it acknowledging defendants' wish to waive their Sixth Amendment right to counsel or, alternatively, was it granting defense counsels' motion to withdraw on the grounds of an ethical conflict? As noted, the government espouses the former view, defendants emphasize the latter. A careful review of the record convinces us that, although the question is not free from doubt, the defendants' characterization of the district court's action is the more accurate. Ironically, however, such a view of the proceedings does not finally aid the defendants in light of a district court's broad constitutional discretion whether to grant or deny continuances.

A.

When, at the beginning of the sentencing hearing, defense counsel renewed their motion to withdraw from continued representation of Attar and PVI, the district court, reasonably enough, sought first to ascertain Attar's own wishes. The only preference that Attar clearly expressed, however, was to withdraw his guilty plea. The court expressly denied Attar's (oral) motion and then twice presented Attar with his three options—to proceed *pro se*, to continue with representation by Cheshire and Gusler, or to represent himself with Cheshire and Gusler as standby counsel. After Attar conferred briefly with his attorneys, Cheshire addressed the court as follows:

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after permitting their first counsel to withdraw. We need not address this claim independently, for the constitutional inquiry required to resolve it is identical, in this context, to that required to resolve the defendants' Sixth Amendment claim. *See Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613 n.1 (4th Cir. 1986); *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (citing standard used to analyze due process challenges to refusals to continue in analyzing Sixth Amendment challenge to refusal to grant continuance).

> For the purpose of explaining to Your Honor and also for the . . . record, Mr. Gusler and I find ourselves in a very difficult position . . . .
>
> I have here in a sealed envelope a defense memorandum, legal and factual, as it relates to the pre-sentence report that has been filed by the probation office.
>
> Our client has told us during the completion of this document . . . that the positions that we were taking as it relates to the presentence report, and the basic initial objections that we had been making to the presentence report all along, were incorrect because he was not guilty.
>
> Now he has told us that he wanted to remove us as counsel for various reasons, and I don't want to get into all of that for fear of prejudicing somebody.
>
> And he has told us that he wants to file a motion for a new trial because he is not guilty. He has now told the Court here this morning, also that he is not guilty.
>
> If we were to proceed to represent him at this time under his instructions to us, we would be in a position I believe where we would have to withdraw his objections made through us to the presentence report, and not submit this document because, for the sake of argument, this document may contain legal and factual arguments against the upward enhancements that would be against his present position.

JA 89-90.

What Cheshire conveyed, perhaps as clearly as he could, was the nature of the ethical dilemma at which he had hinted in his earlier motion to withdraw. Attar, it was apparent, would not budge from his insistence that he and PVI were innocent. But Cheshire and Gusler had prepared their objections to the presentence report in accord with the defendants' earlier guilty pleas. That is, they continued to concede factual guilt while advancing other objections to the upward adjust-

ments urged by the government. Were they to conduct Attar's representation at the sentencing hearing in accord with his newly voiced protestations of innocence, they could not, of course, submit their prepared objections.[4] Indeed, it had now become apparent that the only way in which they could represent the defendants at sentencing in accordance with Attar's newly adopted position would be by asserting their innocence—a course neither legally nor ethically open to them in view of the guilty pleas.

It was in appreciation of these considerations, we believe, that the district court suddenly reversed itself and permitted Cheshire and Gusler to withdraw. The district court was evidently convinced that Cheshire and Gusler could not represent Attar, ethically and effectively, at sentencing once Attar denied them permission to acknowledge his guilt. The government is mistaken, then, to contend that the district court properly found that Attar exercised a constitutionally valid waiver of his right to counsel. To the contrary, once the district court understood the nature of the ethical problem with which Attar was confronting his attorneys, it no longer deemed Attar's own preferences controlling. The question then, is not whether Attar waived his right to counsel and, if so, whether his waiver was voluntary, knowing, and intelligent, but whether the district court erred in simultaneously granting counsels' motion to withdraw and denying Attar's motion for a continuance.

B.

There is no doubt that the district court acted well within its authority in granting Cheshire and Gusler's motion to withdraw. The gravity of counsels' reasons for seeking to withdraw easily distinguishes this case from *United States v. Phifer*, 511 F.2d 960 (4th Cir. 1975), in which, after defense counsel complained that defendant's dilatory tactics resulted in his being unprepared for trial, the district court allowed counsel to leave the courtroom and required the defendant to proceed *pro se*. This court reversed, holding that the district court erred in permitting counsel to withdraw. *See also Jackson v. James*,

[4]Indeed, although the district court did not know it at the time, Cheshire and Gusler had included in their written objections an argument for a downward adjustment for Attar's acceptance of responsibility.

839 F.2d 1513 (11th Cir. 1988). Indeed, defendants appear to concede on appeal that trial counsels' ethical quandary was insoluble.

The more difficult question is whether, once having appreciated the substance of counsels' ethical conflict and therefore the propriety of permitting them to withdraw, the district court should have granted a continuance to enable Attar to secure substitute counsel. The determination whether a continuance is justified is left to the sound discretion of the trial court. *Morris v. Slappy*, 461 U.S. 1, 11 (1983). We have held that a district court need not grant a continuance for purposes of securing new counsel where the request for it plausibly can be viewed as simply a delaying tactic or as otherwise unreasonable. *See, e.g., Gallop*, 838 F.2d at 107-09; *Sampley v. Attorney General of North Carolina*, 786 F.2d 610, 613-16 (4th Cir. 1986). Under that basic principle, we are satisfied that a district court might properly find that the belated creation by a defendant of an inextricable ethical predicament for his counsel constitutes a plausible basis for exercising discretion to deny a continuance to secure new counsel after allowing former counsel to withdraw. Such conduct can properly be viewed as a constructive discharge of counsel undertaken for dilatory or unreasonable purposes just as would be the failure, despite fair opportunity, to have secured counsel originally—with the same legal consequences. We are further satisfied that discretion was properly exercised here notwithstanding the complication presented by the fact that the district court's earlier refusal to allow counsel to withdraw effectively deprived the defendants of around five days in which to seek new counsel before sentencing. Although a district court should always consider the extent to which its denial of an earlier motion to withdraw might have unfairly prejudiced the defendant before it proceeds to deny a request for a continuance, the district court here quite properly could view the defendants' ultimate situation as one entirely of Attar's own unreasonable creation.

In sum, given the facts that Attar's about-face occurred just a few short days before sentencing, that sentencing had already been continued once (for nearly six weeks) at the defendants' request, and that the defendants' attempt to withdraw their facially valid guilty pleas faced precious little, if any, prospect of success—we cannot say that

the district court abused its discretion in refusing to grant a continuance so that Attar could seek to retain new counsel.[5]

IV.

For the foregoing reasons, we affirm the district court's sentencing order.

AFFIRMED

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[5]Because we have concluded that under the particular circumstances of this case it must be analyzed as one most analogous to those in which defendants seek last-minute continuances to secure counsel despite earlier fair opportunity to do so, rather than as one in which defendants with counsel arguably have waived the right to continued representation, defendants' invocation of *Faretta v. California*, 422 U.S. 806 (1975), is misplaced. When a defendant seeks and is denied a last-minute continuance, the issue is not whether he has validly waived his right to counsel by a voluntary, properly informed choice to proceed *pro se*, *see id.* at 835, but the quite different issue whether by a constitutional exercise of judicial discretion, he properly has been deprived of any choice but to proceed *pro se*. *See, e.g. Sampley*, 786 F.2d at 613-16.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 23, 1994

No. 93-5724
CR-92-88-F

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

AMIR JAMES ATTAR

Defendant - Appellant

No. 93-5725
CR-92-88-F

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PERFECT VIEW, INC.

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for

rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK